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AUTHOR Kelley, Edward P., Jr.; Gerry, Frank C.
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ABSTRACT

Case law and the rulings of the National Labor Relations Board involving unit placement of religious faculty are reviewed. The rulings have been criticized by Roman Catholic religious orders as arbitrary, capricious, illogical, and illegal. Faculty unions wishing to exclude religious faculty from the bargaining unit have cited conflict of interest and poverty vows. In some cases, these arguments have persuaded the National Labor Relations Board to exclude religious faculty. In other unit determination hearings the same arguments were rejected. To rationalize its behavior, the Board has developed a "community of interest" criteria, taking into account a number of different factors. It is suggested that sooner or later the Board and the courts must address the constitutional question of First Amendment freedoms of religion and association of Title VII religious discrimination. In the cases already decided, the Board and the courts have weighed the university control, relationship between religious order faculty and the administration, hiring practices and salary, fringe benefits and contributions made by the religious order faculty back to the college. The implications of the constitutional questions on the free exercise of religion and the issue of religious discrimination could push some religiously affiliated institutions beyond the jurisdiction of the Board, thereby removing the legal impact of union activities. (SW)

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BARGAINING UNIT PLACEMENT OF RELIGIOUS FACULTY

By

Edward P. Kelley, Jr.

and

Frank C. Gerry

Edward P. Kelley, Jr., Esq.
Director

James Gemmell
Associate Director

Frank C. Gerry, Ph. D.
Associate Director

Billie Willits Kramer
Assistant Director

George Ward Angell
Consultant

The rulings of the National Labor Relations Board involving unit placement of religious faculty have been criticized by Roman Catholic religious orders as arbitrary, capricious, illogical, and illegal. Faculty unions wishing to exclude religious faculty from the bargaining unit have cited conflict of interest and poverty vows. In some cases, these arguments have persuaded the National Labor Relations Board to exclude religious faculty. In other unit determination hearings the same arguments were rejected. To rationalize its behavior, the NLRB has developed a "community of interest" criteria, taking into account a number of different factors. Sooner or later, however, the NLRB and the courts must address the constitutional question of First Amendment freedoms of religion and association and of Title VII religious discrimination. In this paper Edward P. Kelley, Jr., who is an attorney, and Frank C. Gerry, an experienced hand in the seas of collective negotiation, review the decisions and case law and offer some navigational aids to the voyage that lies ahead.

James Gemmell
Associate Director

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Many college faculties and administrators are being called upon to weigh the possibilities of academic unionization and to determine the desirable scope of collective bargaining on their campuses. Faculty at over 600 public and private colleges have formed unions since 1969.[1] Private higher education faculty have been able to unionize since the National Labor Relations Board (NLRB or Board) asserted jurisdiction over private colleges in 1970.[2] Essential to this unionizing process is the decision identifying which employees and job classes will be afforded bargaining rights;[3] this issue is most often resolved through the unit determination proceeding. The effectiveness of the collective bargaining process may hinge on the unit determination decision; thus, it often becomes the first point of conflict between faculty and administration. Whether or not the faculty will vote for a union, which union is chosen as exclusive representative and the ultimate success of the union is influenced by categories included or excluded as a result of the unit determination.[4] Only those faculty in the unit are eligible to vote in any election and only unit members will be covered by any contract that results from the bargaining process.

Disputes frequently arise over whether particular categories within the faculty are too closely aligned with the administration to be includable in a faculty unit. Department chairpersons, librarians and counselors are prime examples of these categories.[5] Disagreements have also occurred regarding professional school faculties, such as law, medicine, theology, and adjunct faculty as well as part-time and visiting faculty members.[6] The objection raised to these groups is that their positions are too dissimilar in wages and conditions of employment to warrant a finding of community of interest and thereby inclusion with the full time teaching faculty unit.

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[1]Academic Collective Bargaining Information Service. Institutions and Campuses with Faculty Collective Bargaining Agents, (Special Report #12 Update), Washington, D. C., April 1978.

[2]Cornell University, 74 LRRM 1269 (1970). In this case, jurisdiction was asserted over Cornell University and Syracuse University. It overruled a denial of jurisdiction in Trustees of Columbia University, 29 LRRM 1098 (1951). The NLRB decided that "assertion of jurisdiction is required over those private colleges and universities whose operations have a substantial effect on commerce in order to insure the orderly, effective and uniform application of the national labor policy." 74 LRRM at 1275.

[3]The unit determination is necessary only when the faculty and administration do not agree on the class of employees who will comprise the individual unit.

[4]After the unit determination, those included in the unit vote on whether or not they want to form a union for collective bargaining purposes.

[5]See, e.g., Fordham University, 78 LRRM 1177 (1971); Trustees of Boston University v. NLRB, 548 F.2d 391, 94 LRRM 2500 (1st Cir. 1977).

[6]Id.

A particular and unexpected problem has developed with religiously affiliated colleges, particularly those run by Catholic religious orders.[7] Some local faculty organizations have seen a diversity of interests between lay faculty[8] and their colleagues in religious orders and have sought to exclude them from the bargaining unit. In their view, since one of the basic presumptions of collective bargaining is a conflict of interest between management and employees, fellow faculty members who belong to a religious order, particularly the order that operates the college, may be too closely associated with the college administration to support the union in its confrontations with management. Also, lay faculty contend that the vow of poverty demonstrates such a difference of economic priorities and life style that the union's effectiveness in negotiating for increases in wages and other benefits requires the exclusion of those faculty members in the religious order.

Currently there are over 225 colleges in the country that hold membership in the Association of Catholic Colleges and Universities. Of these, 170 describe themselves as "Roman Catholic" institutions and the remainder use the term, "independent, non-profit." Thirteen (9 Catholic and 4 independent) have selected bargaining agents and 12 (7 Catholic and 5 independent) have held elections resulting in decisions not to form a union. As the moderate but steady trend toward increasing faculty unionization continues, the question over the placement of religious order faculty members will continue to be a source of controversy.

Beyond the surface problems always faced in unit determination proceedings are the complex constitutional ones of First Amendment freedoms of religion and association and Title VII religious discrimination. It is only a matter of time before the NLRB and the courts are forced to address these issues for higher education[9] and their decisions could have profound repercussions at religiously affiliated educational institutions as well as

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[7]Religious orders are groups of persons within the Roman Catholic Church who, through the vows of poverty, chastity and obedience, formally commit themselves to serve that church within a community with a particular apostolic and spiritual tradition.

For the purposes of this report the following designations are used:

a) order religious: those members of the order who run the college/university

b) affiliated religious: members of a religious order separate from the order administering the college/university

c) professional religious: jointly the order and affiliated religious on the faculty

[8]Lay faculty is defined for this report as all members of the faculty unit who are not members of a Catholic religious order. Ordained ministers and members of any other religious community are included in this definition.

[9]During the Fall 1978 term the Supreme Court heard Catholic Bishops of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977), cert. granted 46 U.S.L.W. 3511, 1978, a case in which a lower court had decided that the NLRB does not have jurisdiction over parochial elementary and secondary schools.

hospitals, nursing homes and similar church related charitable institutions.[10]

Congress gave the NLRB wide discretion to establish bargaining units that would be "appropriate for the purpose of collective bargaining"[11] and would "assure to employees the fullest freedom in exercising the rights guaranteed by this Act."[12] The courts have interpreted this as requiring the Board to designate an appropriate unit but not necessarily "the most appropriate" one.[13] The Supreme Court has stated that the unit determination "involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed."[14] The courts should interfere in the determination only when it is "arbitrary, unreasonable and not supported by substantial evidence."[15]

The Board has developed a "community of interest" criteria to guide its exercise of discretion. It attempts to determine whether or not potential unit members share a community of interest by looking at a number of factors such as:

1) similarity in the scale and manner of determining earnings;
2) similarity in employment benefits, hours of work and other terms and conditions of employment;
3) similarity in kinds of work performed;
4) similarity in qualifications, skills and training of employees;
5) frequency of contact or interchange among employees;
6) relationship to administrative organization of employer;
7) history of collective bargaining;
8) desires of affected employees; and
9) extent of union organization.[16]

The Board has not established a single policy on whether of not a community of interest exists between lay and religious faculties, but has

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[10]For unit determinations in non-collegiate institutions see Nazareth Regional High School v. NLRB, 549 F.2d 873, 94 LRRM 2897 (2d Cir. 1977); Lay Faculty Association v. Archdiocese, 82 LRRM 2700 (1973); Catholic Charities of Buffalo, 90 LRRM 1279 (1975); St. Rose de Lima Hospital, 92 LRRM 1181 (1976); Carroll Manor Nursing Home, 82 LRRM 1479 (1973); St. Anthony Center, 90 LRRM 1405 (1975).

[11]29 U.S.C. Sec. 153(b).

[12]29 U.S.C. Sec. 159(b).

[13]See e.g., Szabo Food Services, Inc. v. NLRB, 550 F.2d 705, 94 LRRM 2264 (2d Cir. 1976) and Atlas Hotels, Inc. v. NLRB, 519 F.2d 1330, 89 LRRM 3057 (9th Cir. 1975).

[14]Packard Motor Car Co. v. NLRB, 330 U.S. 485, 19 LRRM 2397 (1947).

[15]Szabo, 550 F.2d at 707 (citing cases).

[16]NLRB v. St. Francis College, 562 F.2d 246, 249, 96 LRRM 2134 2135. (3d Cir. 1977).

made decisions based on an analysis of the particular situation at each institution. In the cases already decided, the NLRB and the courts have weighed the university control, relationship between religious order faculty and the administration, hiring practices and salary, fringe benefits and contributions made by the religious order faculty back to the college.

The NLRB addressed this issue for the first time in Fordham University[17] in 1971 and decided that membership in a religious order was not necessarily inconsistent with collective bargaining. In Fordham the American Association of University Professors supported the inclusion of 70 Jesuits[18] in a unit of 500 full time faculty members, and the administration did not oppose it. Hiring, salaries and all conditions of employment were identical for lay and Jesuit faculty members. Most of the Jesuits chose to have the university forward their salaries directly to the community although they could have received them personally. The Board noted in its opinion that the university was controlled by an independent, self-perpetuating Board of Trustees and viewed as evidence of the autonomy of the university the fact that Jesuits who left the order would be allowed to retain their faculty status even if the religious community were to object. Looking at the desires of the affected employees, the similarity in terms and conditions of employment between the lay and religious order faculty and the relationship between the control of the university and the Jesuits, the Board concluded that there was a sufficient community of interest between the religious and lay faculty to warrant the inclusion of the Jesuit faculty members in a general faculty unit.

The Board reached the opposite conclusion in Seton Hill College[19] in 1973. At Seton Hill College the faculty of 95 included 58 members of the Sisters of Charity, the founding order of the college. The lay faculty members sought to have the 58 Sisters of Charity excluded from the unit, although they voiced no objection to the inclusion of two priests and a sister who were affiliated religious. The administration argued that the 58 Sisters of Charity should be included. The Board did not find a sufficient community of interest despite identical hiring practice standards, salary and working conditions. Instead the Board focused on the complex relationship between the sisters and the college and the divergence of economic interests between the Sisters of Charity and the lay teachers. The order owned the grounds and the buildings and leased them to the college for $1.00 a year. Half of the members of the Board of Trustees were from the order and the order religious took a vow of obedience to the Mother General who was also a trustee. In the Board's view, although each sister was an employee, she was also in a sense a part of the employer since the order owned and administered the college.

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[17] 78 LRRM 1177 (1971).

[18] The Jesuit priests (Society of Jesus) are the members of the founding order at Fordham University. The case did not address the issue of the placement of affiliated religious members of Fordham's faculty.

[19] 82 LRRM 1434 (1973).

The Board found in particular that the economic interests of the lay faculty and the Sisters of Charity were dissimilar. The college had provided separate programs of fringe benefits for the two groups and the Board saw this as evidence of the college's intent to treat them as separate entities in economic matters. Although the salary levels were technically the same, the wages of the Sisters of Charity were paid directly to the order and the sisters were committed by contract to return a set percentage of these salaries to the college as an annual gift. (In 1971 this "gift" totaled over $480,000.) The Board concluded that in fact the nuns were receiving a substantially lower salary than lay teachers. The nuns were not dependent on wages to support themselves and their vow of poverty was considered to be an indication that they were not interested in the "economic rewards of their employment" unlike their counterparts among the lay faculty who contended in their petition to exclude the sisters, that "the guts of collective bargaining is negotiating for wages and Fringe Benefits (sic)."[20]

In the Board's view the differences between the lay faculty and order religious were so fundamental that, unlike the order religious at Fordham, the Sisters of Charity would have to be excluded. The Board stated further in a footnote that the Fordham decision was overruled to the extent "it may be deemed inconsistent with this decision."[21] Thus, the Seton Hill analysis was to be looked upon as controlling in future situations posing the same problem.

In 1976 an NLRB Regional Director applied this Seton Hill analysis to a bargaining unit determination at D'Youville College in Buffalo, New York and concluded that four sisters of the founding order, the Grey Nuns of the Sacred Heart, should be excluded from the unit despite the wishes of both the union and the administration that the sisters be included. The college appealed the exclusion and won a reversal by the Board.[22] At D'Youville the Board found that, unlike the situation in Seton Hill, both the lay faculty members and the administration saw a sufficient community of interest between the laity and the sisters to warrant inclusion and the order did not own or administer the college. Although the college was established by the Sacred Heart order, it was reorganized in 1970 and a Board of Trustees was vested with both ownership and administrative control. Unlike Seton Hill, the Board of Trustees at D'Youville was not dominated by the order's sisters; in fact, the corporate charter specified that not more than one-third of the members of the board may be members of religious orders. Thus the NLRB could find no basis for concluding that the nuns had a relationship to the college different from that of any lay faculty member. The Board concluded that where the parties involved are satisfied there is a sufficient community of interest and there seems to be no statutory or other overriding

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[20] Id. at 1435.

[21] Id. at 1435 n.4. The Fordham decision, however, was not reversed; rather any inconsistency in the analysis. Under the Seton Hill analysis, the Fordham unit would still include the other religious.

[22] D'Youville College, 92 LRRM 1578 (1976).

policy considerations which would preclude inclusion, then the wishes of the parties involved would be followed.

Soon after D'Youville the Board was again confronted with a collective bargaining situation at Niagara University in which the affected parties were in conflict over the inclusion of religious faculty members within the unit. The faculty of 155 at Niagara included 17 order religious (Eastern Province Vincentians) and 4 affiliated religious (3 sisters and 1 Vincentian from the New England Province). The lay faculty sought to exclude all the professional religious from the bargaining unit. The college wished to have the entire faculty, both lay and professional religious, in the one unit and thus a unit determination by the Buffalo Regional Director of the NLRB was necessary. When the Regional Director ruled in favor of the exclusion of all the professional religious faculty members, the college appealed to the national Board.

The Board viewed the order religious and the affiliated religious separately and rendered a split decision which certified the unit to include the four affiliated religious[23] but to exclude the Vincentians (order religious) of the Eastern Province Vincentians.[24] On a claim that the Board's exclusion of order religious was arbitrary and unreasonable the college obtained a review of the decision by the Second Circuit Court of Appeals, which agreed with the college and ordered the inclusion in the bargaining unit of the 17 order religious.[25]

The case is best analyzed by separating the arguments and opinions for the affiliated and the order religious placement. The initial decision was made on the question of the affiliated religious. The laity had sought to exclude all members of religious orders based on the vow of obedience to a religious superior.[26] The Board, however, was not persuaded that this vow

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[23] Niagara University, 94 LRRM 1001 (1976).

[24] Niagara University, 94 LRRM 1082 (1976).

[25] Niagara University v. NLRB, 558 F.2d 1116, 95 LRRM 3355 (2d Cir. 1977).

[26] The four affiliated religious were three sisters and one priest. The sisters' religious orders were the Daughters of Charity, Sisters of St. Francis (Third Order Regular) and Our Lady of Victory Missionary Sisters. The priest was a Vincentian of the New England Province and his religious Superior was from his own Province. Although he had an Acting Superior from the Eastern Province, because he was living at Niagara, his ultimate Superior was from New England.

The Daughter of Charity also had a remote affiliation with the Vincentians that presented no "divided loyalties" problem to the Board. Her immediate supervisor was in Buffalo and the next higher superior was an International Superior. This International Superior shared authority with another International Superior who was a priest appointed by authorities in Rome to assume compliance of the order with Canon Law. This priest also happened to be an International Superior for the Vincentian priests.

by itself could require exclusion from the unit. Rather it accepted the testimony that "The obligations under the vow of obedience are concerned with matters of religion and not with the individual's professional conduct as a professor, or with their activities with respect to labor or other professional organizations."[27] Even though each religious superior is responsible for approving employment and reassigning members of each order, such authority is of no consequence while the priest or sister is employed at Niagara. Thus, the vow of obedience should have no effect on unit placement.

The union was no more successful in arguing exclusion based on the vow of poverty. Although the implications of the vow of poverty were determinative in the exclusion of the Sisters of Charity in Seton Hill, the Board did not think that the situation of the affiliated religious at Niagara warranted the same action. The four affiliated religious personally received their salaries from the university, although most of this money was eventually forwarded to their respective religious orders. Their salaries, moreover, were important to the affiliated religious because this money was used to support particular activities of their individual orders, such as caring for the sick and retired members of the order and running a home for boys. Thus, in the Board's view, these affiliated religious shared with the lay faculty the same perspective on the importance of wages.

At this point in the case the Board addressed the broad issue of its own role in evaluating the religious vow of poverty and its effect in determining the economic priorities of any faculty member. Perhaps cognizant that they were approaching the first amendment prohibition against meddling (often called "excessive entanglement") in matters relating to the free exercise of religion, the Board stated that it did not believe that "the way a person chooses to spend his or her money is a relevant consideration with respect to questions of unit placement."[28] The union's position on "how money is spent" seemed in part to rest on what the Board viewed as "an unstated and unproven assumption that a desire for income is somehow related to the particular manner in which it is spent."[29] They concluded that "the whole concept here is at best a morass with which this Board has no special expertise to deal."[30]

The community of interest with lay faculty was not affected by the dissimilar treatment of the affiliated religious in tenure and benefits. None of the religious faculty members, either affiliated or order, were eligible for tenure and some chose not to participate in the health and retirement plans. The Board weighed these differences in benefits against the total employment situation at Niagara and determined that "they indicated little more than a diversity of immediate interests that would be found in any unit, such as one

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[27] Niagara University, 94 LRRM at 1002.

[28] Id. at 1003.

[29] Id. at 1003, n.4.

[30] Id.

combining young and old employees."[31] Accordingly, the affiliated religious were found to have the requisite community of interest appropriate for placement in the bargaining unit with lay faculty members.

Although this unit clarification proceeding settled the issue of affiliated religious at Niagara, the NLRB still refused to change the Regional Director's decision to exclude the seventeen order religious. When the Board refused to reconsider this exclusion of order religious the university petitioned the U. S. Court of Appeal's Second Circuit for review. In the federal court proceeding the university argued that not only was the decision inconsistent with the results in D'Youville and the initial Niagara case on affiliated religious, but that the exclusion of order religious was based on the religious vows of poverty and obedience and was therefore a violation of the Constitution and Title VII of the 1964 Civil Rights Act.[32] The NLRB disputed this contention by claiming that the basis of the exclusion was not the religious vows but rather was due to a disparity of economic interests, a basis which the Second Circuit itself had found valid in its Nazareth Regional High School decision.[33]

The Board saw a disparity in wages and living conditions between the order religious and other faculty members and therefore argued that a community of interest did not exist between the two groups. The Vincentians not only lived rent-free in a building owned by the university but also shared the housing with some Vincentian administrators of the university. Their salaries went directly to the Vincentian order and the order made an annual gift to the university equal to that part of their total salaries not used for necessities and upkeep of the local religious house. The Board saw this voluntary gift as a "forced rebate" which resulted in the Vincentians receiving substantially less in economic benefits from the college than the lay faculty did. The Board viewed this difference in economic benefits as being similar to the situations in both Seton Hill and Nazareth Regional High School where there had been definite contractual arrangements for salary to be returned to the institution. Moreover, to exclude the 17 Eastern Vincentians, in the Board's opinion, would impose only a minor burden on their right to practice their religion when balanced against the interest of the other employees in exercising to the fullest their rights guaranteed by the NLRA.[34]

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[31] Id. at 1003.

[32] The Constitutional issue argues a violation of the First Amendment guarantee of free exercise of religion. The Title VII matter argues a violation of the statutory prohibition against discrimination based on creed.

[33] Nazareth Regional High School v. NLRB, 549 F.2d 873, 94 LRRM 2897 (2d Cir. 1977). In Nazareth the court stated that "the exclusion of a group of employees because of substantial variance in pay scale was a proper exercise of discretion." Id. at 879, n.3., 94 LRRM at 2900, n.3.

[34] Although great judicial deference is given to all First Amendment guarantees, no right is absolute. It must be balanced against rights of other citizens and thus situations will arise when a minor burden will be allowed on religious exercise. This burden of exercise, however, is not an infringement on the individual's right to his religious belief.

The court upheld the university's petition and found the NLRB decision to be arbitrary and inconsistent with previous decisions, including the Niagara unit clarification supporting the inclusion of the four affiliated religious. The Board's claim that Seton Hill was controlling was seen by the court as in conflict with the NLRB's policy of attenuated interest in the vows of poverty and obedience that it had articulated in the Niagara decision on the affiliated religious.

The court found that the Regional Director relied on five factors in reaching the exclusion decision which the Board then affirmed without any significant discussion: the vow of poverty, the community housing of Vincentian faculty and administration, the religious unwritten contract, their ineligibility for tenure and the authority of their superiors to reassign them at any time. The court quotes the Board's statement in the clarification decision regarding the irrelevance of the way people choose to spend their money upon unit placement as a means of showing the Board's inconsistency vis a vis unit placement of the two types of religious faculty. The court then distinguished the gift to Niagara from the gift to Seton Hill; the opinion stressed the fact that the Seton Hill donation was given as a result of a written contractual arrangement between the sisters and the college whereas no such agreement existed between the Vincentians and Niagara University.

The court ultimately subscribed to the NLRB's contention that "community of interest" is the chief criteria in establishing the bargaining unit and found that similarities between the lay faculty and Vincentians in wage scale and working conditions (e.g. probation, leave, promotion, academic freedom and eligibility for the employer's life insurance and retirement plans) were sufficient to justify inclusion of the Vincentians. The differences that did exist in participation in the retirement and life insurance plans, the unwritten contractual arrangement for the Vincentians and their ineligibility for tenure were dismissed by the court which quoted from the Board's own unit clarification decision that such differences were "hardly and whole or even an overwhelmingly large part of the employment situation, and they indicated little more than a diversity of immediate interest that would be found in any unit."[35] The court pointed out that these same differences between religious and laity also applied to the four affiliated religious and yet the Board did not consider these differences as significant enough to exclude them from the unit.

One interesting exchange that occurred in this case was over the issue of whether the members of religious orders could form their own bargaining unit. The NLRB's position was that the professional religious were entitled to form a separate "religious faculty" unit where there would be no question about a community of interest. Thus the Board argued that the existence of this opportunity made the exclusion from the lay faculty unit, at most, a minimal burden on the order religious.

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[35] 558 F.2d at 1121, 95 LRRM at 3358 (quoting 94 LRRM at 1003).

The university took the opposite stance and argued that expecting the Vincentians to form a separate bargaining unit was segregation based on religious beliefs. Brown v. Board of Education was cited in support of the principle that "Separate is not equal either as a matter of law or as a matter of fact."[36]

The university then suggested some problems that could arise from separate units. They projected that 90% of the faculty would belong to the lay unit and 10% to the hypothetical professional religious unit. It is foreseeable that either unit "could seek to exclude the other from performing bargaining unit work (viz: teaching) or could seek to obtain superseniority in layoffs for the members of the unit it represents."[37] Given the strength of the significantly larger lay faculty unit, the university speculated that there is little question that the Vincentians would be harmed by this type of bargaining. The court seems to recognize the far-reaching implication that such a division could produce and concludes its decision with the opinion that exclusion of the Vincentians from the regular faculty unit "deprives them of any meaningful opportunity to exercise their collective bargaining rights."[38]

After the Niagara University court decision there had been final decisions on the issue of the placement of religious faculty members at four institutions. The controversial nature of the problem is compounded by the need to balance the community of interest criteria against the particular characteristics of each separate institution. The unit determination for St. Francis College in Loretto Heights, Pa. was being litigated almost simultaneously with the Niagara University case. When the union sought to exclude six Franciscan priests from the bargaining unit at St. Francis College, the Regional Director for the NLRB agreed to the exclusion. The college objected and appealed the decision first to the NLRB[39] and then to the federal courts. In a decision that looked solely at the unit determination based on community of interest, the Third Circuit Court of Appeals found the NLRB exclusion order to be arbitrary and unreasonable. The court was emphatic that issues of freedom of religion and Title VII religious discrimination were not being decided.[40]

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[36]Reply Brief for Niagara University at 7, 558 F.2d 1116, 95 LRRM 3355 (2d Cir. 1977).

[37]Id.

[38]558 F.2d at 1121, 95 LRRM at 3358.

[39]St. Francis College, 92 LRRM 1551 (1976). The NLRB refused to reconsider the Regional Director's exclusion order or to relitigate the charges that the exclusion resulted in religious discrimination in violation of Title VII.

[40]St. Francis College v. NLRB, 562 F.2d 246, 96 LRRM 2134 (3d Cir. 1977).

The court criticized the NLRB for attempting to probe "employee states of mind, motives, or individual preferences"[41] in deciding community of interest. It was the subjective nature of this inquiry, unsupported by testimony that led to the court's determination that the NLRB decision should be reversed. The NLRB had based the exclusion of the Franciscans on the difference they perceived in salary and fringe benefits and on a "special and complex" relationship between Franciscan faculty members and Franciscan administrators which could result in a conflict of loyalties that might affect the collective bargaining activities of the faculty union. Neither criterion, however, was found to be supported by the testimony presented. Accordingly, these criteria which led to the exclusion of the Sisters of Charity at Seton Hill could not be used to support exclusion of the Franciscans at St. Francis.

St. Francis College was founded by the Franciscans in 1847 but in 1966 it reorganized its structure (much like D'Youville College) so that the college was separated from order control and lay persons joined the Board of Trustees. In 1973 further changes occurred, possibly influenced by the Seton Hill decision, and the Franciscans were given contracts "largely identical" to the lay faculty. The only fringe benefits that they did not participate in were medical insurance and the pension program. In 1973 the Franciscan monastery, whose 18 residents included the six faculty priests, began to make a voluntary gift to the college which amounted to approximately 50 percent of their salaries. It is important to note that the college, albeit the prime recipient of the monastery's charity, was not the sole beneficiary. The monastery also made contributions to the care of the aged, to missionary efforts and to the training of candidates for the priesthood. Testimony established not only that the priests were concerned about salary so that these donations could be continued, but also that some Franciscans would moonlight to supplement their incomes. This evidence effectively weakened the NLRB claim that the priests did not share with lay faculty members a common concern over salary.

The NLRB based its claim of "special and complex" relationship between Franciscan faculty members and administrators on the concept of family relationship. A family relationship may be the basis for excluding employees who have close, continuing ties to the management, but there is no per se rule to that effect.[42] The court, however, was not persuaded that the members of the Franciscan community were analogous with family members.

Furthermore, the Board did not prove its claim that the overlapping relationship between Franciscan faculty and administrators distinguished their interests from those of lay faculty members. The college had argued that just as there may be lay faculty members who are not concerned about salary, there may be lay faculty members who have developed a special relationship with the college which might affect their support of some union efforts. The

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[41] Id. at 250, 96 LRRM at 2137.

[42] See e.g., NLRB v. Caravelle Wood Products, Inc., 504 F.2d 1181, 87 LRRM 2579 (7th Cir. 1974).

college's reasoning was persuasive and the evidence in the record supported a finding that "the religious faculty members are independent-thinking individuals who are not under the domination of the college's Franciscan administrators."[43]

Although the two Federal court cases on the issue have ordered the inclusion of all religious faculty members in the bargaining units, the issue is still unsettled. In his concurring opinion in St. Francis Judge Rosenn emphasized the limited scope of that opinion: "We most certainly do not suggest that religious faculty members can never be excluded from a faculty bargaining unit."[44] Future cases will be decided on their own merits, and it is expected that the NLRB is alert now to the importance of introducing substantial testimony to support their arguments.

Judge Rosenn urged the NLRB to rely on its traditional objective tests to determine community of interest and criticized any other approach:

> When the Board ventures into the mysteries of individual motivation, it renounces the reasoned decision-making that is its statutory charge and pursues instead a course of unavoidable speculation.[45]

Although this decision is binding on the NLRB in this case the Board is not legally obligated to follow the court's recommendations in future cases. Rosenn's comments seem to indicate that the Third Circuit will not hesitate to listen to an appeal based on inquiry into subjective criteria by the NLRB. Yet the NLRB's case-by-case analysis of the issue is seen by Rosenn as the appropriate approach. He admits that had the NLRB provided the court with objective evidence to establish the nature of the special and complex relationship shared by all Franciscan priests, this might have provided the court with the basis for excluding the order religious from the faculty collective bargaining unit.

Even though the groundwork for policy has been formulated in the cases discussed above, questions still remain for future litigation. What happens if the religious faculty members do form their own collective bargaining units? How does freedom of religion balance with the right to effectively exercise collective bargaining rights? How can the court avoid delving into religious policy when a priest claims that his order has reassigned him because of union activities? What are the implications of the annual donation to the college by the religious faculty and would financial support of the college

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[43] St. Francis College v. NLRB, 562 F.2d at 257, 96 LRRM at 2142 (Rosenn, J. concurring).

[44] Id. at 257, 96 LRRM at 2143.

[45] Id. at 256, 96 LRRM at 2141.

by an individual lay faculty member also create a conflict of loyalty?

The judicial process customarily results in the court narrowing the focus of its decisions so that only issues fairly raised by the parties will be considered, and when several issues are involved the court may reach its decision on a single issue and avoid addressing the more controversial ones. To date only 30 of the nation's 250 Catholic colleges have voted on the question of union representation for collective bargaining, thus the sensitive problems caused by the unit determination likely will surface repeatedly in the future.

The call in Judge Rosenn's concurrence for more evidence in the record has alerted the NLRB to the direction it should take in future cases on the exclusion of religious faculty members. It is clear that the court orders to include religious faculty members in Niagara and St. Francis do not change the underlying principles of Seton Hill. The error made by the lay faculty at Niagara and St. Francis was to presume that the exclusion of religious faculty members as ordered in Seton Hill would be automatically controlling in their own cases. Thus, there was no substantial development of a record on the claims of economic differences and conflict of loyalties. Had they been able to present such evidence to the courts, the decisions might have followed Seton Hill and supported the exclusion of religious faculty members.

The changes in the governing structures of many colleges and universities since the late 1960's have made it difficult to prove that these institutions still have a financial dependence on the founding religious order or that the order exercises significant control over the academic policies of the college. Absent a written contract as in Seton Hill, those who seek to exclude religious faculty members from their units for economic reasons will have to establish evidence of an implied contract which requires the return of a significant portion of the salaries of the order religious to the institution. A pattern of continuing contributions and evidence, perhaps shown by statistics, that the college administration expects and depends upon these donations may have to be presented. It will be important to show that the voluntary contribution is in reality an integral part of the employment situation for the order religious. This would substantiate any lay faculty claim that the order religious are, in reality, paid on a significantly different salary level.

The conflict of loyalties basis for exclusion seems to require a two-tiered proof. First, it may be necessary to show that most of the influential administrative positions are still held by members of the founding order; then, a confidential relationship - one transcending that formed between those same administrators and the lay members of the faculty - must be shown between those administrators and the religious faculty members seeking inclusion in the collective bargaining unit. The burden will be on the group seeking exclusion to show that the community life and the dependence of the religious on their orders produce a "special and complex" relationship between faculty members and administrators. Judge Rosenn seemed sympathetic

to such an argument and could foresee that while the religious vow of obedience does not extend beyond religion into professional matters, there may still be sufficiently strong ties from the historical relationship between the college and the order to exclude the religious faculty members.

The constitutional questions on the free exercise of religion and the issue of religious discrimination hang in the background of the decisions and one day may demand evaluation by the courts. The implications could be extensive and could push some religously affiliated institutions beyond the jurisdiction of the NLRB, thereby removing the legal impact of union activities. The Board, by directing attention in Niagara University away from analysis of religious freedom issues and to vows of poverty and obedience has helped to keep the focus of the courts on less complex and controversial matters. The Supreme Court, however, will soon hear arguments in Catholic Bishops of Chicago v. NLRB,[46] a case challenging the jurisdiction of the NLRB over diocesan primary and secondary schools.

If the Board were to be denied jurisdiction over the parochial primary and secondary schools, there could be a carryover into the NLRB's authority over religiously affiliated higher education. The irony of such a situation would be that at institutions clearly controlled by the religious order, e.g., Seton Hill, where the NLRB seemed most secure in its exclusion of religious faculty members, the Board would lose its jurisdiction while at the institutions which have loosened the religious ties, some in direct response to Seton Hill, the NLRB would still have authority. Thus, the tighter the religious control the less likely it could be that the administration would be forced to deal with faculty unions.

Traditionally, however, the Court has made a sharp distinction between parochial primary and secondary schools and the religiously affiliated colleges. The primary and secondary schools are seen as playing an integral role in the proselytizing mission of the Catholic church while the role of Catholic higher education is seen as fulfilling goals that are basically secular.[47] It is for this reason that the courts have allowed Federal and state funds to be granted to religiously affiliated colleges and universities. The secular orientation of the higher educational institutions have allowed the courts to evaluate these institutions without opening themselves to charges of either excessive entanglement in religious matters or of inhibiting the free exercise of religion through the regulations attached to the government

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[46]559 F.2d 1112, 95 LRRM 3324 (7th Cir. 1977), cert.granted 46 U.S.L.W. 3511, 1978.

[47]See Lemon v. Kurtzman, 411 U.S. 192 (1973).

financial support received by the schools.[48]

It is foreseeable that a First Amendment problem could arise when a member of a religious community comes into conflict with a religious superior because of union activities. Although the vow of obedience should not extend into professional areas, the religious superior generally has the authority to reassign members of the order. Fear of reassignment may cause a religious faculty member in a union to temper his support of legitimate union activities. Should an active union member be reassigned there may be charges by the union that the transfer was the result of the administration's disapproval of union activities. A court would be exceedingly reluctant to investigate such a problem which would require an inquiry into policies of the religious community. Based on a Court of Appeals decision in McClure v. Salvation Army[49] some observers believe it would be contrary to the first amendment for the Board to adjudicate grievances between a church and its priests and sisters. In McClure the court denied jurisdiction to the Equal Employment Opportunity Commission to hear a complaint of sex discrimination brought against the Salvation Army by a female officer. The court found Title VII inapplicable to the employment relationship between a church and its ministers. By analogy, to apply the provisions of the Civil Rights Act in this situation would result in encroachment by the state into an area of religious freedom guaranteed by the first amendment.

Another problem that must be faced by any school that excludes religious faculty from its unit is the divisiveness caused by this action. The same friction could also result from the religious forming their own units. The collegiality so important to the educational atmosphere could be seriously impaired.[50] The image of a college or university as a community of scholars could be marred by one group's exclusion of the other from the process in which significant decisions affecting both of them are made.

If two units are formed to bargain with the administration over similar

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[48]One of the major problems of any constitutional investigation into freedom of religion is that the guarantee is a two-edged sword. The court must balance the right to free exercise with the prohibition against establishment by the government of any religion. Favor shown to any religious group may be interpreted as an aspect of government establishment of that religion. See generally Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding the Amish exempt from state compulsory high school education laws) and Sherbert v. Verner, 374 U.S. 398 (1963) (7th Day Adventist may not be denied unemployment compensation because she refused to work on Saturday, the Sabbath of her faith.)

[49]460 F.2d 553 (1972).

[50]See Kahn, "The NLRB and Higher Education: The Failure of Policymaking Through Adjudication." U.C.L.A Law Review, 1973, 21, p. 63.

issues, one unit could seek to undermine the other by making lesser demands on the college and thus creating for themselves a better spirit of cooperation with the administration. If the religious unit were to negotiate a salary scale below that established for or set by the lay unit, the college might threaten the lay unit with the hiring of more professional religious faculty members when faculty positions become available and qualified professional religious candidates apply for them.

The problem of divisiveness was addressed in a case challenging NLRB jurisdiction over parochial schools in the Archdiocese of Philadelphia.[51] The court recognized that the Board's exclusion of religious in parish schools could lead to a "divisiveness or competitive interface between and among the lay and religious faculty members" which "would work a harm to the religious goals and objectives of the pastors and their church."[52] The court speculated that unions might negotiate such provisions as a union shop which would lead to the partial, substantial or total ouster of the religious. Such an effect, it recognized, would do grave harm to the mission of parochial schools and thus interfere with the free exercise of religion.

Moreover, individual professional religious who are excluded from bargaining units may raise the issue of an impermissible burden on the free exercise of their religion and a barrier to their participation in the mission of the church. As pointed out by the religious faculty at St. Francis College, Franciscans would be forced to renounce their vows and sever relations with the order in order to gain unit inclusion if the court did not otherwise find the requisite community of interest.[53]

The idea that a lay unit would negotiate the religious faculty members out of teaching positions is not pure hyperbole. This possibility was raised in Seton Hill where, although the court would not agree with the college's claim that the union could refuse to permit religious faculty to teach, they did acknowledge that this topic could be a matter of negotiation between the parties.[54] Niagara University warned that the union could seek to obtain superseniority in layoffs for its members so that religious faculty would be less secure in their jobs in case of faculty retrenchment.[55] One reason why most unions would never seek such agreements on union shop or seniority is the prospect of the founding order reacting by withdrawing their voluntary, and usually significant, annual donation. The loss of such a sizable contribution could jeopardize the financial stability of an institution and threaten the wages and even employment prospects of union members. Thus it is highly

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[51] Caulfield v. Hirsch, 95 LRRM 3164 (E.D. Pa. 1977).

[52] Id. at 3176.

[53] Brief for St. Francis College at 32, 562 F.2d 246, 96 LRRM 2134.

[54] 82 LRRM at 1435 n.3.

[55] Reply brief for Niagara University at 7, 558 F.2d 1116.

unlikely that religious order members will be bargained out of employment as a result of exclusion from the lay faculty unit.

All the ramifications of the exclusion of religious order faculty members have not yet been fully explored by the Board, the courts or the faculties themselves. With collective bargaining on the increase at private institutions it seems certain that many questions remain to be answered on this issue before we can say the final amen.

BIBLIOGRAPHY

Academic Collective Bargaining Information Service. Institutions and Campuses with Faculty Collective Bargaining Agents, (Special Report #12 Update), Washington, D. C., April 1978.

Kahn, "The NLRB and Higher Education: The Failure of Policymaking Through Adjudication." U.C.L.A. Law Review, 1973, 21, p. 63.